

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RBG PLASTIC LLC d/b/a
RESTAURANTWARE,

Plaintiff/Counter-Defendant,

vs.

FIRST PACK LLC d/b/a PACK N
WOOD,

Defendant/Counter-Plaintiff.

Case No. 17 CV 6283

Chicago, Illinois

June 4, 2019

9:37 AM

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE MANISH S. SHAH

APPEARANCES:

For the Plaintiff:

JAYARAM LAW, INC
BY: MR. BRETT A. MANCHEL
125 South Clark Street
Suite 1175
Chicago, Illinois 60603

For the Defendant:

MANDELL MENKES LLC
BY: MR. GEORGE V. DESH
MR. STEVEN L. BARON
One North Franklin Street
Suite 3600
Chicago, Illinois 60606

Court Reporter:

SANDRA M. MULLIN, CSR, RMR, FCRR
Official Court Reporter
219 S. Dearborn Street, Room 2260
Chicago, Illinois 60604
(312) 554-8244
sandra_mullin@ilnd.uscourts.gov

1 (Proceedings heard in open court.)

2 THE CLERK: 17 C 6283, RBG Plastic versus First Pack.

3 MR. MANCHEL: Good morning, your Honor. Brett
4 Manchel for the plaintiff.

5 MR. DESH: Good morning, your Honor. George Desh and
6 Steve Baron on behalf of First Pack.

7 THE COURT: Good morning. I can give you a ruling on
8 the motion to strike the plaintiff's expert.

9 The standards are well settled and both sides agree
10 on the basic standards under Rule 702. I am to exercise a
11 gatekeeping function to make sure that the expert has an
12 adequate foundation by way of qualifications and methodologies
13 that are applied to a relevant issue and would be helpful to
14 the jury, or factfinder, to hear.

15 Mr. Hartzer is qualified to discuss search engine
16 optimization and marketing techniques. He is not a lawyer and
17 cannot provide opinions interpreting the settlement agreement.
18 He may not opine that certain usage violates the settlement
19 agreement. For example, Paragraph 20 of his report contains
20 that kind of statement.

21 The amended complaint does include allegations of use
22 or utilization of prohibited words, not just bidding on them.
23 Although, the main focus of the complaint is about bidding, so
24 I can see why that's been the focus of discussion. But how the
25 words might be found by search engines and tied to the

1 defendant is a relevant topic in the litigation.

2 Mr. Hartzer, though, does not have a reliable
3 methodology or qualifications to opine that the other offices
4 are part of the same company and attributable to the defendant
5 or that the defendant controls those websites. So I am
6 striking that opinion.

7 He does not have a qualified foundation to render an
8 opinion that this defendant controls the other websites, such
9 that he can say they are using the slogans on the foreign
10 websites. He also cannot opine that websites are not printed
11 material under the agreement. That's in one way a legal
12 conclusion of applying the terms of the settlement agreement;
13 and, on the other hand, he is also not offering any helpful
14 expertise when he says websites don't use ink and paper.
15 That's just common knowledge. That doesn't require any
16 expertise. And I would not permit him to offer that testimony.

17 But he can describe how search engines associate
18 terms from one site -- from one website with another, based on
19 links. He can explain the links as he found them. He is
20 qualified to explain how linking works and how search engines
21 can generate hits associated to this defendant based on the
22 foreign websites. Whether that amounts to use under the
23 settlement agreement is a different matter that he may not
24 opine on. The jury can decide whether that is used or not.
25 And his qualifications are not helpful beyond the point of

1 describing how search engines capture the information.

2 So focusing on his conclusions that are on Pages 27
3 through 29 of the report, his Opinions 2 through 4 are limited
4 along the lines that I've just discussed. He is not able to
5 say, this particular defendant used the slogans, and he is not
6 permitted to say that this defendant owned or operated the
7 other websites. But he can provide opinions about how websites
8 are accessible, how they receive internet traffic from visitors
9 located in the United States and how -- how that -- how he
10 observed those links and how they work. He may offer his
11 opinion about how -- because of the links, how search engines
12 then make certain connections to the defendant through the
13 research he has done. So his opinions in that regard are
14 admissible.

15 Opinion No. 5, that the defendant has not excluded
16 certain phrases from their ad campaigns, is permissible. He
17 has an explanation, based on his experience in the industry,
18 namely the use of negative keywords to exclude search terms,
19 and that supports his opinion. Its relevance might be
20 debatable, and down the road I may exclude it on relevance
21 grounds. But for present purposes, I'm not excluding it on
22 Rule 702 grounds.

23 Finally, with respect to damages, his Opinion No. 6,
24 he can offer an opinion that traffic to the sites resulted in
25 sales. He has explained his methodology. The weakness in that

1 methodology is not so weak that it's entirely inadmissible.
2 Cross-examination can expose the lack of credibility in his
3 methods. But he has no basis to opine that those sales were
4 lost sales for the plaintiff. There is nothing in his report
5 or qualifications or his methodology that supports that. He is
6 not a causation expert, he is a search engine optimization
7 expert. So he may not offer an opinion that those sales are
8 lost sales to the plaintiff.

9 So for those reasons, the motion to strike is granted
10 in part, denied in part.

11 And what's next? Summary judgment?

12 MR. MANCHEL: Yeah, we talked briefly yesterday, or
13 e-mailed, and would suggest maybe 60 days for dispositive
14 motions.

15 MR. BARON: That's fine.

16 MR. DESH: Yes, that's fine.

17 THE COURT: Will both sides be filing dispositive
18 motions, or is it just -- or just the defendant?

19 MR. MANCHEL: I think we would as well. I understand
20 that results in the cross-motions, and sometimes judges like to
21 have one side do it.

22 THE COURT: Why don't we do this: I'll give you a
23 date for dispositive motions in about 60 days.

24 THE CLERK: It's going to be Monday, August 5th,
25 everyone.

1 MR. MANCHEL: August?

2 THE CLERK: 5th.

3 MR. MANCHEL: Can we possibly have until that Friday?

4 THE COURT: That's fine.

5 THE CLERK: The 9th, then.

6 MR. MANCHEL: Thank you.

7 THE COURT: But what I'd like from the parties is by
8 Friday, August 2nd, I'd like a status report containing a
9 proposal for how you'd like to brief the forthcoming
10 dispositive motions. By that time, you'll have made your
11 decisions about whether both sides are filing motions, or not.
12 You'll be well on your way to thinking about how many contested
13 or uncontested facts are at issue and whether we need two
14 responses and two replies or we can do some kind of
15 consolidated briefing, in light of the forthcoming motions.
16 I'd at least like you to think about what's the most efficient
17 way to brief them.

18 File a status report by Friday, August 2nd, and I'll
19 enter a responsive scheduling order on the motion. So you
20 don't need to notice the motions for presentment. Those are
21 due on Friday, August 9th. Status report due Friday,
22 August 2nd, and I'll enter a responsive schedule.

23 Is there anything else we should cover this morning?

24 MR. DESH: Not from our side.

25 MR. MANCHEL: Thank you.

THE COURT: Thank you.
(Proceedings concluded.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/s/ SANDRA M. MULLIN

June 5, 2019

SANDRA M. MULLIN, CSR, RMR, FCRR
Official Court Reporter

Date